Date: August 16, 1996
Case No.: 94-INA-625

In the Matter of:

SE JIN AUTO REPAIR AND BODY SHOP,
Employer

On Behalf Of:

KI PYO JEON,
Alien

Appearance: Richard M. Ruger, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 16, 1993, Se Jin Group, Inc., d/b/a Se Jin Auto Repair and Body Shop ("Employer"), filed an application for labor certification to enable Ki Pyo Jeon ("Alien") to fill the position of Auto Mechanic/Foreign (AF 49). The job duties for the position are:

> Repairs and overhauls foreign and domestic cars, vans, trucks, and other automotive vehicles. Examines vehicles to determine nature & extent of damage or malfunction using computer analyzer, scopetester, air tools, pressuer (sic) tools, presses, gauges & hand tools, estimate costs & discuss with manager. Inspects and repairs mechanical units, such as differential, engine, diesel engine, transmission, carbretor (sic), blower, generator, starter, etc. Disassembles unit and repair or replace parts, including accessories, headlights. Relines & adjust brakes. Examines electrical units & rewire ignition system. Rebuild parts, such as crankshafts & cylinder blocks. Aligns front end, repairs or replaces shock obsorbers (sic), radiator. Mends damaged body & fenders. Test drive cars.

The requirements for the position are three years of experience in the job offered. Other Special Requirements are "[m]ust be experienced in repair or (sic) foreign cars, such as Japanese, German, Italian & Korean made cars. Must have own hand tools."

The CO issued a Notice of Findings on January 20, 1994 (AF 44), proposing to deny certification on the grounds that the Employer's offer of $1,920 per month was below the prevailing wage of $3,130 per month in violation of 20 C.F.R. § 656.20(c)(2), and the Employer's rejection of U.S. applicant Price was unlawful and lacked specificity in violation of § 656.21(b)(6).

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[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In its rebuttal, dated February 28, 1994 (AF 37), the Employer contended that based on its own survey of auto repair facilities in Los Angeles County, the offered wage of $1,920 is at the high end of the survey, and meets the requirements for the prevailing wage. The Employer further contended that U.S. applicant John Price has been working for the last 10 years as a "body man," was only seeking such a position, and when he was informed the position was for that of an auto mechanic, Mr. Price stated he must have sent his resume to the wrong position. The Employer stated that a letter was sent to Mr. Price confirming the telephone conversation on July 29, 1993. The Employer provided a copy of its wage survey.

On June 24, 1994, prior to the Final Determination, the Employer submitted more detailed information regarding its survey, challenging the CO's survey as flawed because: (1) it considered a job category only generally similar; (2) with a wide range of experience; (3) among employers of various sizes; (4) over a much broader geographical area; and, (5) is now out of date (1993) compared to the survey conducted by the Employer (June 1994).

The CO issued the Final Determination on July 21, 1994 (AF 9), denying certification because the Employer's wage survey only shows Korean-named employers in the Employer's immediate vicinity, where the NOF required the Employer to show that the wage is prevailing in the entire area of employment. In addition, the CO noted that he could not tell if the mechanics were full time in the Employer's survey, and that the CO's survey represents hundreds of mechanics, where the Employer's survey only represents 18.

On August 23, 1994, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Under § 656.20(b)(2), the Employer is required to offer a wage that equals or exceeds the prevailing wage determined under § 656.40. That regulation states that the prevailing wage for occupations not subject to the Davis-Bacon Act, as in the instant case, must be determined by the average wage paid to workers similarly employed in the area of intended employment. Where the employer is notified that its job offer is below the prevailing wage, but fails to either raise the wage to the prevailing wage or to justify the lower wage it is offering, certification is properly denied. *Editions Erebouni*, 90-INA-283 (Dec. 20, 1991).

When challenging the CO's prevailing wage determination, an employer bears the burden of establishing both that the CO's determination is in error, and that the employer's wage offer is at or above the correct prevailing wage. *PPX Enterprises, Inc.*, 88-INA-25 (May 31, 1989) (*en banc*); *Sun Valley Co.*, 90-INA-391 (Jan. 6, 1992); *Tse Yu Chun, M.D.*, 90-INA-413

(Nov. 19, 1991). It is the employer's burden to demonstrate "by a preponderance of the evidence that its survey is both accurate and relevant." *Ren-Mar Studios*, 90-INA-205 (Sept. 30, 1992).

In this case, the Employer claims that the CO's survey is flawed for five different reasons. The first alleged error was that the CO's survey considered a job category "only generally similar" to the Employer's. The CO relied on the June 1993 Los Angeles Regional Survey from the Employer's Group (formerly the Merchants and Manufacturers Association and Federated Employers) (AF 29). The job category of the CO's survey was that of "Automotive Mechanic," and the job duties listed are virtually identical to that of the Employer's duties listed on the ETA 750 application (AF 31). There is no error in the CO's survey with regard to job category.

The second alleged error of the CO's survey was that it considered individuals with a wide range of experience. The CO's survey included individuals with two to 20 years of experience. The Employer only required three years of experience, but its survey asked "[d]o you have any people who perform the job described above, and who have at least the minimum requirements stated?" and asked only for a "yes" or "no" response (AF 16-25). The Employer's survey could have also considered individuals with much more than the minimum experience, and is not superior to the CO's survey in this respect. Moreover, the CO's survey also included individuals with only two years of experience, who would have been making a smaller salary and who would have driven the prevailing wage down. The CO's wage survey is not in error in regard to consideration of experience.

The third alleged error is that the Employer's survey considered firms of various sizes. The CO's survey considered 15 employers, four with 250 employees or less, five with 251 to 750 employees, and six with over 750 employees. The total number of employees surveyed that were auto mechanics was 68 (AF 31). The Employer's survey considered 10 employers with one to eight total employees, and a survey total of 18 employees who were auto mechanics. The Employer's argument here also is without merit. Nine auto mechanics considered in the CO's survey were in the "250 employee or less" category. Moreover, the Employer's argument fails legally as it is not the size or nature of the Employer's business that is taken into account when considering workers who are "similarly employed," but the skills and knowledge required for the job offered. The purpose of establishing a prevailing wage is to keep wages for U.S. workers from being depressed by alien labor in a particular geographic area. See *Hathaway Children's Services*, 91-INA-388 (Feb. 4, 1994) (*en banc*). Employers are not exempted from prevailing wage requirements on the basis of their size because regardless of that size, they must compete for workers with the required skills and knowledge in their area. "There is no provision in the law or regulations which allows for waiver of the prevailing wage requirement on the basis of an Employer's financial hardship." *Norberto La Rosa*, 89-INA-287 (Mar. 27, 1991).

The fourth alleged error is that the CO's survey is over a much broader geographical area. The Employer's survey only considered businesses in the "Korean Town" area of Los Angeles. The regulations at 20 C.F.R. § 656.40(b)(2) require that the survey be those "having substantially comparable jobs in the occupational category in the area of intended employment." The "area of intended employment" is defined as "the area within normal commuting distance," and if that place is within a Standard Metropolitan Statistical Area (SMSA), "the SMSA is deemed to be any place within normal commuting distance of intended employment." 20 C.F.R. § 656.3. The "Standard Metropolitan Statistical Area" has been defined by the U.S. Office of Management and Budget as "a county or group of contiguous counties which contain at least one central city of at least 50,000 inhabitants or a central urbanized area of at least 100,000." See also, *Seibel & Stern*, 90-INA-86 (Apr. 26, 1990). The CO's survey is not in error because it follows the requirements of the regulations, where the Employer's survey does not. Moreover, considering rural areas along with urban areas would normally tend to drive the prevailing wage down. *Seibel & Stern, supra*.

The fifth and final alleged error is that the CO's survey is out of date. The Employer's survey was taken in June 1994, the CO's survey was taken in June 1993. There is nothing in the record to show why wages for auto mechanics in the Los Angeles area were suddenly depressed to the Employer's level between July 1993 and June 1994. The CO's survey is only one year older than the Employer's, and is not so dated as to be in error for determination of the prevailing wage. Moreover, the regulations allow for the Employer to be within 5% of the prevailing wage survey, allowing for some margin of error and fluctuation in wages should the survey be dated. 20 C.F.R. § 656.40(2)(i).

In summary, we find that the Employer has not established that the wage survey relied upon by the CO in establishing the prevailing wage is in error. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 1996, for the Panel:

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Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.